Supreme Court, U.S.
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In the

Supreme Court of the United States

TERRIBLE HERBST, INC.,
a Nevada Corporation,

Petitioner,

v.

UNION OIL COMPANY OF CALIFORNIA,
dba UNOCAL, a California Corporation,

Respondent.

Petition for a Writ of Certiorari to the
The United States Court of Appeals
for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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55 pp

QUESTION PRESENTED

When a state permits federal courts to certify state law issues to the state's highest court, should a federal court use such procedures to allow the state's highest court to determine a substantial, unsettled question of state law?

PARTIES TO THE PROCEEDING

Petitioner

Petitioner Terrible Herbst ("Herbst") is a Nevada Corporation which is not publically traded. Herbst was the defendant in the District Court and the appellee in the Ninth Circuit Court of Appeals.

Respondent

Respondent Union Oil Company of California ("Unocal") is a California corporation. Unocal was the plaintiff in the District Court and the appellant in the Ninth Circuit Court of Appeals.

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OPINIONS BELOW

The June 9, 2003 opinion of the Ninth Circuit (App., infra, pages 1a-16a) is reported at 331 F.3d 735 (9th Cir. 2003). The July 18, 2003 order of the Ninth Circuit denying Herbst's petition for rehearing *en banc* (App., infra, page 27a) and the order of the District Court granting judgment in favor of Herbst (App., infra, pages 17a-26a) are unreported.

JURISDICTION

The Ninth Circuit's opinion was filed on June 9, 2003. Herbst's timely petition for rehearing *en banc* was denied on July 18, 2003.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves the following statutes of the State of Nevada:

1. Nevada Revised Statute section 11.200.

This statute concerns and is entitled "Computation of Time." It is set forth on page 30a of the Appendix.

2. Nevada Rules of Appellate Procedure Rule 5.

This statute concerns and is entitled "Certification of Questions of Law." It is set forth on page 28a of the Appendix.

STATEMENT OF THE CASE

This case arises from a contractual dispute over who is responsible for cleaning up pollution beneath a service station in Las Vegas, Nevada. Unocal bought the service station from Herbst in 1986 on the condition that Herbst would clean up the existing contamination. App., infra, p. 2a. Herbst thereafter cleaned up and monitored the site for the next three years. In 1989 the pollution suddenly increased, and the Nevada Department of Environmental Protection (NDEP) ordered Unocal to begin monitoring the site because the contamination contained some of Unocal's proprietary fuel additives. In 1990, the NDEP relieved Herbst of the duty to monitor the site but reserved the right to hold Herbst liable for any damage it had already done. App., infra, p. 4a. Seven years later, Unocal and Herbst entered into an agreement tolling the statute of limitations on any claims that Unocal might bring against Herbst arising from the contamination. The agreement further provided that Herbst waived any statute of limitations defenses to any such causes of action. App., infra, p. 4a.

Unocal filed this action one year later for the recovery of its clean-up costs. The parties agreed to try the statute of limitations issue to the District Court, which held that the agreement did not toll or waive the

statute of limitations. The District Court ruled that Unocal's claims were already time-barred when the agreement was signed, and further ruled that, under Nevada Revised Statute section 11.200, Unocal's forbearance to bring a time-barred claim did not constitute consideration for a contract. App., infra, p. 5a. The District Court delayed handing down this ruling, however, until after the jury ruled on Unocal's claims. The jury determined that Herbst had breached its agreement with Unocal and awarded damages to the latter in the amount of $1,086,000. App., infra, p. 5a. Unocal appealed.

A majority of the Ninth Circuit panel assigned to the appeal disagreed with the District Court's interpretation of Nevada law. Although conceding that the Nevada courts have yet to address the forbearance issue, the panel ruled in a published opinion that Nevada's Supreme Court would probably find that forbearing to bring a time-barred claim constitutes adequate consideration to support the waiver agreement. App., infra, p. 6a. Judge Johnnie B. Rawlinson dissented on the ground that the panel should have exercised its power (though not requested by the parties) to certify the forbearance issue to the Nevada Supreme Court. App., infra, p. 15a-16a.. The majority opinion did not address Judge Rawlinson's dissent or otherwise discuss whether certification was appropriate.

On June 20, 2003, Herbst filed a petition for rehearing *en banc* on the grounds that the Ninth Circuit should have certified the forbearance issue to the Nevada Supreme Court. The petition was denied on July 18, 2003; Judge Rawlinson dissented from the denial of the petition. App., infra, p. 27a.

REASONS FOR GRANTING THE PETITION

The Ninth Circuit erred by failing to certify to the Nevada Supreme Court the dispositive issue in this case, namely, whether Nevada law recognizes the forbearance of a time-barred claim as consideration for a contract. Although the Nevada courts have not yet addressed this issue, the Ninth Circuit found, in a published opinion, that the Nevada Supreme Court would likely rule that such forbearance constitutes consideration for a contract. On the basis of this anticipated ruling, the panel majority reversed the judgment in favor of Herbst and instructed the District Court (Hunt, J., Nevada) to enter judgment in favor of the appellant. The third panel member, Judge Rawlinson, dissented from the panel's decision, stating: "I would not presume to second-guess the district court judge on a matter of state law that has not been decided by the state's Supreme Court. I prefer to certify to the Nevada Supreme Court the question of whether Nevada law recognizes the forbearance of a stale claim as consideration for a contract." Judge Rawlinson further stated that "we have an obligation to consider whether novel state-law questions should be certified - and we have been admonished in the past for failing to do so." App., infra, p. 27a.

Judge Rawlinson's argument that the forbearance issue should have been certified is supported by the applicable authorities and should have been adopted by the panel. This Court has strongly encouraged the use of certification procedures for state law questions involving substantial issues which have not been addressed by the state's courts. The Nevada Legislature has enacted legislation providing for certification to the Nevada Supreme Court, and, as one Ninth Circuit justice has

written, it is "practically unheard of" for the Nevada Supreme Court to decline to answer certified questions. *Kremen v. Cohen*, 325 F.3d 1035, 1050 (9th Cir. 2003). (Kozinski, J., dissenting).

The issue as to whether the forbearance question should be certified to the Nevada Supreme Court is of exceptional importance, both to the parties and to litigants generally. Certification of unsettled questions of state law is favored because it avoids conflicts between state and federal courts and allows the state's highest court to have the first opportunity to rule on the undecided issue. Certification also prevents confusion about a state's law due to inconsistent rulings between state and federal courts. Finally, and most importantly, certification prevents substantial injustice to the parties caused by incorrect federal determinations of state law. For all of these reasons, Herbst respectfully petitions for a Writ of Certiorari to review the Ninth Circuit's decision in this case.

I.
THE NINTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A WAY THAT CONFLICTS WITH THE DECISIONS OF THIS COURT

The principal issue presented by this case is whether the Ninth Circuit should have used the certification procedure provided by Nevada law to allow Nevada's highest court to determine an important and undecided question of Nevada law. In its decisions addressing this issue, this Court has repeatedly exhorted the Circuit Courts to use the certification procedure when it is available to observe the principles of federalism and

to avoid the danger of misconstruing state law. The Ninth Circuit's refusal to avail itself of Nevada's certification procedure is contrary to this Court's decisions and should be reviewed and reversed by this Court.

A. Certification Should Be Used To Determine Important And Novel Questions Of State Law Involved In Federal Litigation

Certification today covers territory once dominated by "*Pullman* abstention," after the generative case, *Railroad Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 61 S.Ct. 643, 85 L.Ed. 971 (1941). Designed to avoid federal court error in deciding state law questions, the *Pullman* mechanism remitted the parties to the state courts for adjudication of unsettled state law issues. Attractive in theory because it placed state law questions in courts equipped to rule authoritatively on them, *Pullman* abstention proved protracted and expensive in practice, for it entailed a full round of litigation in the state court system before any resumption of proceedings in federal court. *Arizonans For Official English v. Arizona*, 520 U.S. 43, 77, 117 S.Ct. 1055, 1073, 137 L.Ed.2d 170 (1997).

Certification procedure, in contrast, allows a federal court faced with a novel state law question to put the question directly to the State's highest court, reducing the delay and cutting the cost of litigation. *Arizonans For Official English v. Arizona*, *supra*, 520 U.S. 43, 77, 117 S.Ct. 1055, 1073. To facilitate this procedure, all of the states of the Ninth Circuit, including Nevada, have adopted legislation allowing the federal courts to certify issues to the state's highest court for

resolution. Nevada Rules of Appellate Procedure, Rule 5; *Kremen v. Cohen*, 325 F.3d 1035, 1050 (9th Cir. 2003) (Kozinski, J., dissenting);

This Court has long urged the Circuit Courts to use certification to address "the problem of authoritatively determining unresolved state law involved in federal litigation." *Clay v. Sun Ins. Office*, 363 U.S. 207, 212, 80 S.Ct. 1222, 1226, 4 L.Ed.2d 1170 (1960). In *Arizonans For Official English v. Arizona*, *supra*, 520 U.S. 43, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997), this Court stated that "[t]aking advantage of certification made available by a State may greatly simplify an ultimate adjudication in federal court"; the Court also warned that "[s]peculation by a federal court [about state law issues] . . . is particularly gratuitous when the state courts stand willing to address questions of state law on certification from a federal court." *Id.* at 520 U.S. 79-90, 117 S.Ct. 1074-1075.

Several policy reasons have been advanced for the certification process. Certification avoids conflicts between state and federal courts and "in the long run saves time, energy and resources and helps build a cooperative federalism." *Lehman Brothers v. Schein*, 416 U.S. 386, 391, 94 S.Ct. 1741, 40 L.Ed.2d 215 (1974). Certification also strengthens the primacy of the state's highest court in interpreting state law by giving it the first opportunity to rule on an undecided issue. *Geib v. Amoco Oil Co.*, 29 F.3d 1050, 1060 (6th Cir. 1994); citing Note, *Inter-Jurisdictional Certification: Beyond Abstention Toward Cooperative Judicial federalism*, 111 U. Pa. Law. Rev. 344, 350 (1963). In addition, certification prevents confusion about a state's law due to inconsistent rulings between state and federal courts.

See Braun, *A Certification Rule For California*, 36 Santa Clara L. Rev. 935, 940 (1996).

The most compelling reason for certification, however, is the possibility of substantial injustice to the parties caused by incorrect federal determinations. An example of this possibility is provided by *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962). In that case, the Fifth Circuit held that a tobacco company was entitled to judgment against a plaintiff with lung cancer because Florida law precluded recovery under an implied warranty theory. The panel subsequently granted rehearing to permit certification of this question to the Florida Supreme Court. The Florida Supreme Court found that the Fifth Circuit's opinion misinterpreted Florida law. The Fifth Circuit issued a second opinion reversing its prior decision, stating:

> First, to the Justices of the Supreme Court of Florida we wish to express publically and with deep sincerity our appreciation for their answer to the question which we certified to that Court. That answer has saved this Court . . . from committing a serious error as to the law of Florida which might have resulted in a grave miscarriage of justice.

Green v. American Tobacco Co., 325 F.2d 673, 674 (5th Cir. 1963).

A second example, with a much less agreeable ending, is provided by *De Weerth v. Baldinger*, 836 F.2d 103 (2nd Cir. 1987). De Weerth owned a Monet painting which was stolen, apparently by American servicemen, at

the end of World War II. Eventually the painting reemerged and De Weerth sued for replevin. The District Court in New York ruled that De Weerth's action was timely under state law and ordered the painting's return. *De Weerth v. Baldinger*, 658 F.Supp. 688, 695 (S.D.N.Y. 1987). The Second Circuit reversed, holding that New York law imposed a diligence requirement which had not been met by De Weerth. *De Weerth v. Baldinger*, 836 F.2d at 108, 112. The Second Circuit refused to certify the diligence question to New York's highest court because "that valuable procedure should be confined to issues likely to recur with some frequency." *Id.* at 108, n.5.

Four years later, in *Solomon R. Guggenheim Foundation v. Lubell*, 569 N.E.2d 426 (N.Y. 1991) New York's highest court considered nearly identical facts and decided the issue the opposite way, holding that public policy considerations precluded imposing a diligence requirement. The court also observed that the diligence issue "has recurred several times in the three years since *De Weerth* was decided." *Id.* at 429.

De Weerth returned to the District Court and asked the same judge who had originally ordered the painting returned to grant her relief from the judgment under Rule 60 of the Federal Rules of Civil Procedure. *De Weerth v. Baldinger*, 804 F. Supp. 539, 541 (S.D.N.Y. 1992). The District Court granted relief on the ground that De Weerth should not be penalized for bringing a meritorious action in federal court which misconstrued state law, rather than in a state court which would have ruled correctly. *Id.* at 550. The Second Circuit reversed again, holding that its earlier decision, though wrong, was final. *De Weerth v. Baldinger*, 38 F.3d 1266, 1275 (2nd Cir.

1994). As a result, De Weerth never recovered her painting, even though her action had been timely, because the certification procedure was not used. The Second Circuit's failure to order certification has been much criticized by legal commentators. See Braun, *A Certification Rule For California, supra*, 36 Santa Clara L. Rev. at 940.

B. The Ninth Circuit Erred By Refusing To Certify The Forbearance Issue, A Substantial And Unsettled Question Of Nevada Law, To Nevada's Supreme Court

The policy arguments favoring certification apply strongly to the forbearance issue in this case. As the Ninth Circuit found, the Nevada Supreme Court has not yet determined whether Nevada law recognizes forbearance of a time-barred claim as adequate consideration. App., infra, p. 6a, 15a-16a. The forbearance issue is significant because, as the Ninth Circuit stated in its opinion, the resolution of this issue affects Nevada's policy of encouraging settlement. App., infra, p. 8a., citing *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 530, 706 P.2d 845, 849 (1985). Tolling agreements are commonly used by parties to delay litigation, allowing the parties an opportunity to engage in settlement negotiations. App., infra, p. 8a. The Ninth Circuit found that the District Court's ruling would discourage such agreements, and therefore increase litigation, because "the party with the questionable claim is encouraged to err on the side of caution and bring suit immediately, without negotiating . . . ." App., infra, p. 8a.

Although the Ninth Circuit is undisputably correct that the resolution of the forbearance issue could affect settlement activity, its ruling on the forbearance issue involves the weighing of important policy considerations which should be made by Nevada's highest court, which bears ultimate responsibility for reconciling the state's competing policy interests. The Ninth Circuit's holding will certainly encourage plaintiffs with stale claims to enter into agreements waiving the statute of limitations (to the extent they need such encouragement), for such agreements would be enforceable even if the claims are time-barred. A competing concern, however, is the effect of the Ninth Circuit's holding on potential defendants. Unlike plaintiffs, defendants will avoid waiver agreements because of the Ninth Circuit's ruling that such agreements resurrect time-barred claims. This case is much in point. Although Unocal's claims were time-barred before the waiver agreement was ever made, the Ninth Circuit held that the waiver agreement revived those claims, allowing Unocal to proceed against Herbst. Contrary to the Ninth Circuit's expressed intent, few Nevada defendants will hereafter seek to delay litigation as Herbst did through the use of a tolling or waiver agreement. The formulation of Nevada law based on the weighing of such competing concerns should be made by the Nevada Supreme Court, not by the federal courts. The Nevada court may well determine that public policy is best served when cases are resolved in a timely manner while evidence remains fresh and before memories have faded and witnesses have disappeared. See e.g. *Petersen v. Bruen*, 106 Nev. 271, 273-274, 792 P.2d 18 (1990).

Certification should also be ordered because of the danger that the Nevada courts may subsequently reach a different conclusion concerning the forbearance issue.

Since the Ninth Circuit's opinion has been published, such an occurrence would create confusion in the law and would cause substantial injustice to Herbst.

CONCLUSION

For all of the foregoing reasons, Herbst respectfully requests that its Petition for Writ of Certiorari be granted.

Respectfully submitted,

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(Any footnotes trail end of each document)

No. 01-16683, No. 01-17276

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff-Appellant,

v.

TERRIBLE HERBST, INC.,
Defendant-Appellee.

UNION OIL COMPANY OF CALIFORNIA,
dba/UNOCAL, a California Corporation,
Plaintiff-Appellant

v.

TERRIBLE HERBST, INC., a Nevada Corporation,
Defendant-Appellee.

November 7, 2002, Argued and Submitted,
San Francisco, California
June 9, 2003, Filed

COUNSEL: Alice A. Seebach, Seebach & Seebach, Los Angeles, California; Rodney M. Jean, Lionel Sawyer & Collins, Las Vegas, Nevada, for the plaintiff-appellant.

J. Terry Schwartz and Craig A. Parton, Price, Postel & Parma LLP, Santa Barbara, California; Sean T. Higgins, Las Vegas, Nevada, for the defendant-appellee.

JUDGES: Before: Betty B. Fletcher, Richard S. Arnold,* and Johnnie B. Rawlinson, Circuit Judges. Opinion by Judge R. Arnold; Dissent by Judge Rawlinson.

OPINION BY: Richard S. Arnold

OPINION: R. ARNOLD, Circuit Judge:

This appeal involves a contract dispute over who is responsible for cleaning up pollution beneath a gas station. Union Oil Company of California (Unocal) bought the service station from Terrible Herbst, Inc., in 1986 on the condition that Herbst would clean up the site. In 1990, the Nevada Department of Environmental Protection (NDEP) relieved Herbst of the duty to monitor the site but did not relieve it of liability for any damage it had already done there. The site remained polluted, but it was not clear whether Unocal or Herbst was at fault. Seven years later, as a precursor to settlement talks over who was responsible for cleaning up the land, Unocal and Herbst signed a series of agreements in which Herbst agreed that the statute of limitations would not run and that it would waive its statute-of-limitations defense as to any claims that Unocal "may assert" against Herbst. A year later, Unocal brought this breach-of-contract suit against Herbst and received a jury verdict of approximately a million dollars. The District Court, however, entered judgment as a matter of law for Herbst on the grounds

that the waiver agreement was invalid under Nevada law for lack of consideration, and that the statute of limitations had run on all of Unocal's claims. Additionally, the District Court took the view that the contract applied only to claims that Unocal "may assert," and that the parties intended that phrase to mean claims which were valid, i.e., not time barred. In the alternative, the District Court conditionally granted Herbst's motion for a new trial, an action that is also being appealed.

We respectfully disagree with the District Court's interpretation of Nevada law. If a party withholds the assertion of a non-frivolous claim in reliance on an agreement, that forbearance is sufficient consideration to support a contract. We also think the District Court ascribed a meaning to the waiver agreement that was not supported by the language of the agreement. The District Court also disagreed with some of the factual conclusions of the jury and granted Herbst's request for a new trial. We think that the jury's verdict was not against the clear weight of the evidence. Therefore, we reverse the judgment of the District Court, both on the statute-of-limitations question and on the order for a new trial, and order that the jury verdict be reinstated.

I.

Terrible Herbst, Inc., the defendant, purchased land in Las Vegas, Nevada, in 1981 and built a service station on it. In 1986, while negotiating the sale of the station to Unocal, the parties began to have concerns that pollutants might have escaped into the soil from the gas station. To ensure that the sale would go through, Herbst signed a letter agreement with Unocal

promising to monitor and remediate any contamination at the site until the NDEP certified that the contamination problem had been solved. Unocal bought the gas station and assumed operations there.

Herbst continued to clean and monitor the site for the next three years. In February of 1989, the amount of fuel contamination at the site suddenly increased. The NDEP ordered Unocal to start monitoring the site as well, because the contaminant was found to contain some of Unocal's proprietary fuel additives. However, Unocal's investigators claimed that they could find no leaks in their storage tanks or records indicating that their own fuel was unaccounted for. In May of 1990, the NDEP said that Herbst need no longer monitor the site, but reserved the right to hold Herbst liable for any pollution Herbst had caused. The NDEP did not request that Herbst do anything regarding the site during the next twelve years. Herbst understood NDEP's action to mean that its obligations under the letter agreement with Unocal had been fulfilled. Meanwhile, Unocal continued to incur costs monitoring and cleaning the site.

Unocal wanted to be indemnified for its clean-up costs and contacted Herbst about the site in September of 1997. Herbst's Nevada counsel signed a written waiver of Herbst's statute-of-limitations defense to forestall Unocal from immediately filing suit. The waiver agreement read:Union Oil Company of California ("Union Oil") and Terrible Herbst, Inc. ("Herbst") are attempting to resolve Union Oil's claims relating to Herbst's liability for environmental contamination at and around 101 N. Decatur Boulevard, Las Vegas, Nevada. In furtherance of that effort, Herbst hereby

agrees to toll and extend until March 12, 1998, the limitations period on any cause of action that Union Oil may assert against Herbst arising from or relating to the contamination. Herbst hereby waives any defense based on any statute of limitations to any such cause of action in accordance with this agreement. This agreement shall bind Herbst's heirs, executors, agents, principals, assigns, and successors.This agreement was extended five times as the negotiations continued. Unocal filed its complaint in mid-November of 1998, and the case went to trial in June of 2001. Both parties agreed to try the limitations issue before the District Court and submit all other issues to the jury.

The District Court held that the agreement did not toll or waive the statute of limitations. It concluded that Unocal's claims were already time-barred when the agreement was signed, and that Nevada law would not allow the forbearing to bring a time-barred claim to serve as consideration for a contract. Alternately, the District Court ruled that the contract was meant to encompass only claims that were viable at the time of contracting and thus was not meant to apply to expired claims. The Court announced that it intended to grant judgment as a matter of law for Herbst and dismiss all of Unocal's claims, including its continuing trespass and nuisance claims.

The District Court (prudently) deferred handing down this ruling, and submitted the contract issue to the jury so that a jury verdict would be on the record. The jury deliberated for three days, determined that Herbst had violated its contract with Unocal, and returned a verdict in favor of Unocal in the amount of $ 1,086,000 for past and future costs, which was 58 per cent. of the

damages sought by Unocal. The District Court then vacated the jury's verdict and granted judgment for Herbst as a matter of law for the reasons stated above. The District Court also determined that the jury's verdict was contrary to the weight of the evidence and conditionally granted Herbst's motion for a new trial. Unocal promptly filed an appeal with this Court.

II.

The most important question on this appeal, and the one we address first, is whether Nevada law allows the forbearing to bring a stale claim to serve as consideration for an agreement waiving a statute-of-limitations defense. The Nevada Supreme Court has not decided this question, so we must apply the law as we believe the Supreme Court of Nevada would. *Santana v. Zilog, Inc.*, 95 F.3d 780, 783 (9th Cir. 1996). This Court reviews the District Court's interpretation of Nevada's law de novo. *Wetzel v. Lou Ehlers Cadillac*, 222 F.3d 643, 646 (9th Cir. 2000) (en banc).

The District Court decided as a matter of law that Unocal's forbearance from filing suit could not be consideration. Because of the lack of direct authority in Nevada addressing this question, the District Court sought guidance from the Nevada Supreme Court's interpretation of a statute-of-limitations rule that involves the revival of expired claims: the latter half of Nevada Revised Statutes 11.200. n1

The Nevada Supreme Court interpreted that statute to mean that a debt must be currently enforceable in order for a payment on that debt to extend the time in which suit can be brought on a contract. *Havas v. Long*,

85 Nev. 260, 262, 454 P.2d 30, 31 (1969), citing *Riff v. Kowal*, 76 Nev. 271, 352 P.2d 819 (1960). The District Court determined that the requirement that a debt be currently enforceable is an inherent requirement that applies to all statute-of-limitations provisions, including both the first half of N.R.S. 11.200 and N.R.S. 11.390. n2

We respectfully disagree with this conclusion and believe there are several reasons to think that the Nevada Supreme Court never intended for the currently enforceable requirement to be applied so broadly. Our reasoning is guided by the overarching principle that we should not make unwarranted assumptions in favor of the statute-of-limitations defense. See *Howard v. Waale-Camplan & Tiberti*, 67 Nev. 304, 312, 217 P.2d 872, 876 (1950) ("While the plea of the statute of limitations is not an unconscionable defense, it is not such a meritorious defense that either the law or the facts should be strained in aid of it, nor should this court indulge in any presumption in its favor.") n3

With this approach in mind, we conclude that the Nevada Supreme Court intended the holding of *Havas* to be a narrow one. In *Havas*, the Nevada Supreme Court noted that payment would not resurrect a contract "absent written acknowledgment or new promise to pay, N.R.S. 11.390." 85 Nev. at 262, 454 P.2d at 31. This suggests that if the parties had put something in writing, as they have in the instant case, then they could have revived the debt even though its enforcement was barred by the statute of limitations. This critical fact alone serves to distinguish *Havas* from the case before us. But it is not the only reason we decline to read *Havas* broadly.

We must also consider that *Havas* dealt with the second half of N.R.S. 11.200. The statute refers to traditional debts and was probably meant to protect unsophisticated debtors from inadvertently making themselves liable for stale debts. We should not assume that the interpretation of a rule that furthers this end was intended to apply to all contract cases, including those in which two sophisticated parties negotiate to waive a statute-of-limitations defense.

The District Court's conclusion also conflicts with the Nevada Supreme Court's policy of encouraging settlement. See *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 530, 706 P.2d 845, 849 (1985). We believe the rule propounded by the District Court discourages settlement in several ways. First, parties are put in the difficult position of wanting to settle a case, but without knowing if the settlement agreement is vulnerable to the charge of being invalid for lack of consideration if one side waives claims that are later held to have been time barred at the time of settlement. Another problem is that the party with the questionable claim is encouraged to err on the side of caution and bring suit immediately, without negotiating, because the clock is running, and once the claim expires it would be gone forever no matter what the parties have agreed. Additionally, the waiving party has an incentive to sign waivers until it is sure that the statute of limitations has run, and then to try the statute-of-limitations question on the chance that it can convince the court that the claim was time barred from the beginning, thus giving the waiving party the luxury of not being bound by its own waiver. If the claim was not barred then the waiver served no purpose because the party was waiving a defense that it never had to begin with. We

are disinclined to believe that the Nevada Supreme Court intended *Havas* to have these results.

Moreover, the rule advanced by the District Court is contrary to the general principle of contract law that "[f]orbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless (a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law . . . ." Restatement (Second) of Contracts § 74(1)(a) (1981). See also J. Perillo & H. Bender, 2 Corbin on Contracts § 7.17, p. 420 (rev. ed. 1995); R. Allen, 3 Williston on Contracts § 7.45, p. 720 (4th ed. 1992); E. Farnsworth, I Farnsworth § 2.11, pp. 122-23 (2nd ed. 1998). The Nevada Supreme Court has often referred to the Restatement of Contracts and treatises such as those we have cited to assist it in resolving novel questions of contract law, and there is no reason to think that it would not do so in this case. See, *e.g.*, *Bangle v. Holland Realty Investment Co.*, 80 Nev. 331, 336, 393 P.2d 138, 140-41 (1964) (adopting the Restatement of Contracts position); *Harmon v. Tanner Motor Tours of Nevada, Ltd.*, 79 Nev. 4, 19, 377 P.2d 622, 630 (1963) (adopting the Restatement of Contracts position); *Stanley v. A. Levy & J. Zentner Co.*, 60 Nev. 432, 446, 112 P.2d 1047, 1053 (1941) (citing with approval the Restatement of Contracts). Lacking evidence to the contrary, we believe that the Restatement rule, which better comports with traditional contract theory, is the one the Nevada Supreme Court would adopt if this question were put to it.

Our analysis is not altered simply because Unocal never explicitly promised not to bring suit. An implied promise to forbear exercising a right can be

consideration as readily as an explicit promise not to do so. 2 Corbin § 5.27, p. 141. The Nevada Supreme Court implicitly recognized this in *Mazzuca v. Fund Ins. Co.*, 90 Nev. 409, 528 P.2d 705 (1974). In that case, the Nevada Supreme Court held that implicitly forbearing to exercise a right (cancelling an insurance policy) was sufficient consideration to support a modification of a contract, so long as the insurance company actually did not cancel the policy. 90 Nev. at 411-12, 528 P.2d at 706. Likewise, Unocal's forbearance was sufficient consideration to support the agreement even though it was not expressly stated.

Having established that refraining from bringing suit on a doubtful claim can be adequate consideration in Nevada, we must decide whether Unocal's claim can be considered "doubtful because of uncertainty as to the facts or the law . . . ." Restatement (Second) of Contracts § 74(1)(a) (1981). The District Court recognized, and we agree, that the question of whether the six year statute of limitations had run on the breach-of-contract claim was uncertain enough to require further inquiry. The District Court stated that the "[d]efendant asserted a statute-of-limitations defense and sought summary judgment on that issue, which was denied, there being factual issues to be determined by the Court." Unocal's claim was not frivolous, since it survived to trial, and we conclude that that is enough for its non-assertion to serve as consideration. n4 Herbst and Unocal entered into an agreement that allowed them to focus on settlement rather than filing suit. For the reasons stated above, we believe that the Nevada Supreme Court would hold them to their bargain. In general, forbearing to bring suit on a potentially stale claim can be consideration to

support a contract. More specifically, Unocal actually forbore exercising a valid legal option: filing a non-frivolous lawsuit. Therefore, consideration existed to make the contract binding, and we must reverse the District Court on this point.

III.

Another question on appeal involves the interpretation of the waiver agreement. The District Court found that the parties intended the phrase "may assert" to mean that Herbst waived its statute-of-limitations defense only as to claims that legitimately could have been asserted against it at the time, which, under the District Court's interpretation of Nevada law, could not be claims on which the statute of limitations had already run. The Court stated that "the language 'may assert' means that they may legitimately assert, or upon claims that are actually enforceable and in this case were not enforceable at the time that agreement was entered into. And so the extension only granted extension on causes of action that were still existing and enforceable."

Even under the clearly erroneous standard (assuming this was a finding of fact), we must conclude that the District Court was in error on this question. The problem with its interpretation is that it seems to render the waiver agreement at least partially nugatory. If the claims in question were not at least potentially barred by limitations at the time the agreement was signed, much of the reason for obtaining the waiver agreement disappears. Possibly the language could be interpreted to refer to claims that were not barred at the time the waiver agreement was

signed, but that might later become barred before Unocal brought suit. Such an interpretation does not completely obliterate the purpose for the agreement, but it does reduce it greatly. This is too great a weight for the phrase "may assert" to bear. The natural meaning of the phrase includes any claims that Unocal might later choose to assert. That is the plain language of the contract, and that language should be given effect absent compelling evidence to the contrary, of which there is none in this case. The breach-of-contract claim was one that Unocal might later assert and was within the scope of the waiver agreement. As a result, Herbst waived its statute-of-limitations defense as to that claim.

IV.

We review the District Court's grant of a conditional new trial for abuse of discretion. *Silver Sage Partners, Ltd. v. City of Desert Hot Springs*, 251 F.3d 814, 818 (9th Cir. 2001). The trial court may grant a new trial only if the jury's verdict was against the clear weight of the evidence. *Id.* at 819. " [I]f the jury's verdict is not against the clear weight of the evidence, we may find that a district court abused its discretion in granting a new trial." *Id.*

The District Court believed that the jury had failed to appreciate certain facts and ruled that the jury's verdict was contrary to the clear weight of the evidence. For instance, the District Court believed Herbst's contractual obligations were satisfied by the 1990 letter from the NDEP. The Court also cited evidence from Unocal's experts indicating that Unocal was responsible for significant releases of pollutants

during Unocal's operation of the site. The District Court based its ruling, in part, on a concern that the jury might have mistaken Herbst's contractual liability to clean up the mess it made at the site for an obligation to rid the site of contaminated soil, regardless of who actually contaminated it. Additionally, it thought that Herbst's expert's testimony on pollutant decomposition could not be reconciled with the jury's verdict. The District Court also believed that the jury failed to take into consideration the fact that Unocal failed to mitigate its damages by seeking reimbursement from the state of up to a million dollars.

After examining the record, we find substantial evidence that goes both ways on all of these points. There is clear testimony that Herbst had not satisfied its agreement with Unocal because it had failed to obtain a certificate from the NDEP, a document that the NDEP would issue when warranted. There was also evidence that, at most, a few hundred gallons of Unocal's gasoline were present at the site, in comparison to more than 10,000 gallons of Herbst's gasoline. The District Court also determined that the jury failed to take into consideration Unocal's failure to mitigate its damages. We find this assumption unwarranted; the jury returned a verdict of approximately $ 800,000 less than Unocal requested. This difference may reflect the jury's discounting Unocal's damages because the company failed to mitigate its damages. In either case, we do not find this a sufficient justification for disregarding the jury's verdict. Nor do we think it appropriate to assume that the jury misunderstood the scope of Herbst's liability simply because of the verdict it returned.

This case was an eight day jury trial and involved several different environmental pollutants and conflicting testimony. The District Court was in the best position to evaluate the evidence and its effect on the jury and was able to cite specific examples of evidence it felt the jury had not evaluated properly. We do not lightly disagree with the trial courts in such cases. But upon review, we cannot say that there is any part of the jury's verdict that was against the clear weight of the evidence. It is not the courts' place to substitute our evaluations for those of the jurors. Therefore, we believe the District Court abused its discretion in granting a new trial.

Accordingly, the decision of the District Court is reversed, and the cause is remanded with instruction to reinstate the jury's verdict and enter judgment thereon.

REVERSED.

Footnotes

* The Honorable Richard S. Arnold, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

n1 The entire statute reads:

The time in NRS 11.190 [the general statute-of-limitations provision] shall be deemed to date from the last transaction or the last item charged or last credit given; *and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory*

*note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.*Nev. Rev. Stat. 11.200 (2002) (emphasis added).

n2 Section 11.390 provides:

No acknowledgment of promise shall be sufficient evidence of a new or continuing contract whereby to take the case out of the operation of this [statute of limitations] chapter, unless the same be contained in some writing signed by the party to be charged thereby, except as provided in N.R.S. 11.200. Nev. Rev. Stat. 11.390 (2002).

n3 This language has been repeatedly cited with approval. See, *e.g.*, *State Commission for Equal Rights of Citizens v. City of North Las Vegas*, 93 Nev. 446, 448, 566 P.2d 1139, 1140 (1977); *Hiles Co. v. Johnston Pump Co. of Pasadena, Cal.*, 93 Nev. 73, 77, 560 P.2d 154, 156 (1977); *Servatius v. United Resorts Hotel, Inc.*, 85 Nev. 371, 373, 455 P.2d 621, 623 (1969).

n4 Unocal argues that it also refrained from bringing other claims. Because we find that not bringing the breach-of-contract claim was adequate consideration, we need not address whether Unocal's other claims would have sufficed in its stead.

DISSENT BY: Johnnie B. Rawlinson

DISSENT: RAWLINSON, Circuit Judge, Dissenting:

I must respectfully dissent. I would not presume to second guess the district court judge on a matter of state law that has not been decided by the state's Supreme Court. I prefer to certify to the Nevada Supreme Court the question of whether Nevada law recognizes forbearance of a stale claim as adequate consideration. As we noted in *Kremen v. Cohen*, 314F.3d 1027, 1130 (9th Cir. 2003), "we have an obligation to consider whether novel state law questions should be certified -- and we have been admonished in the past for failing to do so." (citation omitted). Having so considered, I would certify.

CV-S-98-1579-RLH-(RJJ)

UNITED STATES DITRICT COURT
DISTRICT OF NEVADA

UNION OIL COMPANY OF CALIFORNIA
dba UNOCAL,
Plaintiff(s),

vs.

TERRIBLE HERBST,INC.,
Defendant(s).

ORDER
(Motion for Conditional New Trial-#101)

Before this Court is Defendant Terrible Herbst, Inc.'s Motion for Conditional New Trial (#101, filed July 18, 2001). Plaintiff Unocal's Opposition (#105) was filed July 30, 2001. Defendant's Reply (#109) was filed August 13, 2001.

Defendant seeks an order granting a new trial conditioned upon any reversal of this Court's judgment in its favor, pursuant to Rule 50(c)(1), Fed. R. Civ. P. The basis for the motion is that the jury award was contrary to the clear weight of evidence and would result in a miscarriage of justice if allowed to stand.

BACKGROUND

This lawsuit arose out of a dispute as to who was responsible for soil contamination at a gasoline service station site purchased by Plaintiff from Defendant.

Plaintiff alleged a number of causes of action, but the case was limited by the Court to contractual claims. Defendant asserted a statute of limitations defense and sought summary judgment on that issue, which was denied, there being factual issues to be determined by the Court. The matter proceeded to jury trial during which it was agreed that the issue, of whether the statute of limitations had run and whether the defense to the same had been waived, would be determined by the Court of art from and independent of the jury, it being ultimately a legal issue. Following the presentation of evidence to the jury, the Court received the evidence on the statute of limitations issue outside the presence of the jury.

The Court determined that the statute of limitations had run prior to any attempted extension or waiver of defense. It further held that any extension or waiver, after the statute of limitations period had run, was void, and granted judgment to the Defendant on that basis. However, with the hope of avoiding a second trial in the event the trial court was overturned on appeal, the Court permitted the matter to go to the jury for decision. The jury was of the opinion that Plaintiff was entitled to a substantial award.

The site in question was purchased by Unocal from Terrible Herbst in April 1986. The provisions of the agreement of purchase were prepared by Plaintiff Unocal, and included a provision that Terrible Herbst would be responsible for monitoring and remediation of the soil until Terrible Herbst could get a "certificate" from the Nevada Environmental Protection Agency (the actual name is the Nevada Department of Environmental Protection, or "NDEP") stating that the

contamination problem had been satisfactorily solved. The evidence presented demonstrated that the NDEP did not issue any document called a "certificate." With Unocal in possession, Terrible Herbst continued to conduct monitoring and remediation activities for about four years, or until May 1990, when the NDEP issued a letter indicating that Terrible Herbst's responsibility to monitor and remediate was to cease and that future monitoring and remediation was to be conducted by Unocal, based upon a finding that a recent spill had occurred of Unocal's products, although Terrible Herbst was advised that this did not relieve it of liability resulting from a September 9, 1985 release report.

It is expedient to note that the state's letter did not identify to whom Terrible Herbst's liability ran However, no claim or demand was ever made by the State of Nevada for Terrible Herbst to return to the site to address contamination from the September 9, 1985 spill. Furthermore, it was not until late 1997 that Unocal made a demand upon Terrible Herbst to perform its obligations of remediation under the contract. Accordingly, Unocal had possession of the site for eleven years before making the claim that Terrible Herbst had not performed the contract, and that claim was not made until six or seven years after Terrible Herbst had ceased all monitoring and remediation activities at the site. Terrible Herbst had done monitoring and remediation work for four years after Unocal had purchased and taken possession of the property.

It is necessary to remember that the issue here is limited to whether Terrible Herbst breached the

contract, and what damages resulted from that breach. The issue is not Terrible Herbst's liability to the State, or to the public. Nor is it even whether there was contamination of the site from earlier spills during the five years Terrible Herbst owned the property. There was clear evidence that there were spills during the tenure of both parties. It is the contractual obligations of Terrible Herbst, and whether those obligations were performed, that is the question. It is in this context that the Court must examine the jury award to determine whether it is contrary to the clear weight of the evidence, and whether, if this Court's decision is reversed on appeal, a miscarriage of justice would occur if the award is permitted to stand.

DISCUSSION

The power and authority to consider and grant a new trial is "confided almost entirely to the exercise of discretion on the part of the trial court." Allied Chem. Corp. Daiflon, Inc., 449 U.S. 33, 36 (1980). "The trial court's decision, therefore, will not be reversed absent a showing of abuse of discretion." Murphy v. City of Long Beach, 914 F.2d 183, 186 (9th Cir. 1990) The trial court may order a new trial if it finds that a jury's verdict is "contrary to the clear weight of the evidence" or if it is "warranted in the interest of justice." Id. at 186-87.

The Murphy court, quoting Moist Cold Refrigerator Co. v. Lou Johnson Co., 249 F.2d 246, 256 (9th Cir. 1947), cert. denied, 356 U.S. 968 (1958), stated as follows:

It is clear that the district judge had the right, and indeed the duty, to weigh the evidence as he saw it, and to set aside the verdict of the jury, even though supported by substantial evidence, where, in his conscientious opinion, the verdict is contrary to the clear weight of the evidence, or . . . to prevent, in the sound discretion of the trial judge, a miscarriage of justice.

Murphy v. City of Long Leach, 914 F.2d at 187. "The court's control over a trial is illustrated by the court's sui sponte power to grant a new trial on grounds riot alleged by a party. See Fed.R.Civ.P. 59(d)." Id.

The Court's prerogative to weigh the evidence, in order to d determine whether a new trial should be granted, is not extended to the questions of whether a directed verdict or judgment notwithstanding the verdict should be entered. When, however, the Court must consider whether to grant a new trial, it can weigh the evidence, regardless of whether there is s substantial evidence presented at trial to create an issue for the jury. 1t can "assess the credibility of witnesses, and need not view the evidence from the perspective most favorable to the prevailing party." Landes Construction Co., Inc, v. Royal Bank of Canada, 833 F.2d 1365, 1371 (9" Cir. 1987) If the Court finds that the verdict is contrary to the clear weight of the evidence, it may, in its discretion, grant a new trial, even one conditioned upon reversal on appeal. Fed. R. Civ. 50(c)(a).

Taking a page from the Landes decision, this Court will also quote from 11 C. Wright & A. Miller, Federal Practice and Procedure §2806, at 48-49 (197:3) (footnotes omitted):

It maybe doubted whether there is any verbal formula that will be of much use to trial courts in passing on motions [for a new trial on the grounds that the verdict is against the clear weight of the evidence'. Necessarily all such formulations are couched in broad and general terms that furnish no unerring litmus for a particular case. On the one hand, the trial judge does not sit to approve miscarriages of justice. His power to set aside the verdict is supported by clear precedent at common law and, far from being a denigration or a usurpation of jury trial, has long been regarded as an integral part of trial by jury as we know it. On the other hand, a decent respect for the collective wisdom of the jury, and for the function entrusted to it in our system, certainly suggests that in most cases the judge should accept the findings of the jury, regardless of his own doubts in the matter. Probably all that the judge can do is to balance these conflicting principles in the light of the facts of the particular case. If, having given full respect to the jury's findings, the judge on the entire evidence is left with the definite and firm conviction that a mistake has been committed, it is to be expected that he will grant a new trial.

With the foregoing in mind, this Court, upon consideration of the evidence and the award of the jury, finds that the jury's decision is contrary to the clear weight of the evidence, and, if permitted to stand, presents a significant potential for a miscarriage of justice.

It would be unnecessary and unduly difficult to attempt to address every shred of evidence, but the Court will address some of the more significant evidence that the jury miscalculated. Plaintiff's argument, that the fact

that the jury awarded less than was asked is evidence of the fact that they took the following evidence in consideration, is without merit.

It appears that the jury only considered whether there was still soil contaminated from spills which occurred during Defendant's ownership, in determining whether Terrible Herbst still had a duty to remediate the area. The evidence is that all the contamination could never be removed. The issue is, who had the duty to remove it. The overwhelming evidence presented showed that Unocal, when it learned of relatively recent spills during Terrible Herbst's ownership, required Defendant to perform monitoring and remediation until it was relieved of that responsibility by the State governing agency. The language of that obligation was prepared by Unocal. There is some confusion over precisely what was required, but any ambiguity must be interpreted most favorably to Terrible Herbst, since it did not prepare the language of the contract However, it is clear that the State agency relieved Terrible Herbst of its obligation to monitor and remediate in 1990, and gave that responsibility to Unocal, because Unocal had subsequent spills, which were apparently considered intervening events, shifting the responsibility to Unocal. While it is true that the State never "closed" its file, and would never relieve Terrible Herbst of its obligations to the State forever, the State agency never, in all the years since, ever required Terrible Herbst to do anything further. Thus, the clear weight of the evidence shows that Terrible Herbst fulfilled its contractual responsibilities. Arguments over whether the document, by which the State relieved Terrible Herbst, was a "certificate" or not, are irrelevant. The issue is whether the State

relieved it of the responsibilities and ever reinstated them. The clear weight of the ev evidence establishes that the State did relieve Terrible Herbst of its obligations and that it never- reinstated them, or felt that Terrible Herbst had any further obligations to the property_ To this is added the uncontradicted testimony that no formal "closure" letter of non-responsibility would or could be given to Terrible Herbst, but that the prior letter ended their responsibility unless the State changed its mind.

Therefore, the contractual obligations are deemed to have been met.

Furthermore, for approximately seven years thereafter Unocal conducted itself in a manner consistent with its acceptance of the evidence that Terrible Herbst had fulfilled its contractual obligations. It is as though Unocal only belatedly decided, after realizing how much it had spent in monitoring and remediation, since it took over those responsibilities, to see if it could recoup some of those expenses.

There was extensive evidence produced by both parties as to the extent of the spread of petroleum products, even beyond the boundaries of the property. And there is even evidence that some of Defendant's product went beyond the property line. However, the evidence was clear that the farthest spread contained elements of additives only contained in Unocal's products. However, that extensive evidence appears to have only confused the jury as to the issue presented of Defendant's contractual duties to plaintiff. Unfortunately, they seem to have lost sight of that underlying consideration of liability, and only looked to

the presence of contaminated soil, whether it was on or off the property, and regardless of whose product it was.

There was evidence that Unocal failed or refused to seek and obtain reimbursement of its costs of up to nearly one million dollars from the State, although it could have qualified to do so. Thus it totally failed to mitigate its damages. This evidence was ignore d by the jury, also.

There was substantial and uncontradicted evidence of significant removal, by Unocal, of its own product from the soil, during the 1990s, yet the jury awarded $766,000 for past damages and even awarded $320,000 in future damages.

Defendant's expert, who had impeccable credentials, as compared to those of Plaintiff, testified that any release of Terrible Herbst, that was not removed as free product, would biodegrade, defuse or attenuate to de minimis levels. Unocal's expert admitted he had made no calculations in this respect. Plaintiff s own experts admitted to findings of significant releases of product by Unocal after Terrible Herbst had sold the property and during and after Terrible Herbst's remediation efforts.

Although Unocal contends that this Court does not have the authority to order a new trial unless it finds the award as excessive, or that Defendant's waived its right to this motion, or filed it untimely, all of which are not the case, it has provided no evidence contrary to Defendant's evidentiary observations that the jury's award was against the clear weight of the evidence. For

the reasons stated above, and in the opinion of this Court, the jury's award is contrary to the clear weight of the evidence and a new trial should be had if this Court's dismissal is reversed, to avoid a miscarriage of justice.

ACCORDINGLY, for good cause appearing,

IT IS HEREBY ORDERED that Defendant Terrible Herbst, Inc.'s Motion far Conditional New Trial (#101) is GRANTED.

Dated. October l , 2001.

ROGER L. HUNT
United States District Judge

No. 01-16683
D.C. No. CV-98-01579-RLH
District of Nevada, Las Vegas

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNION OIL COMPANY OF CALIFORNIA,
Plaintiff-Appellant,

v.

TERRIBLE HERBST, INC.,
Defendant-Appellee.

Filed: July 18, 2003

ORDER

Before: B. FLETCHER, R. ARNOLD, and RAWLINSON, Circuit Judges.

Judges B. Fletcher and R. Arnold have voted to deny the petition for panel rehearing. Judge Rawlinson votes to grant the petition for rehearing and petition for rehearing en banc. Judges B. Fletcher and R. Arnold recommend denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc Fed. R. App.P.35.

The petition for panel rehearing and the petition for rehearing en banc are denied.

Nevada Rules of Appellate Procedure
Rule 5. Certification of questions of law.

(a) Power to answer. The Supreme Court may answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, when requested by the certifying court, if there are involved in any proceeding before those courts questions of law of this state which may be determinative of the cause then pending in the certifying court and as to which it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

(b) Method of invoking. This rule may be invoked by an order of any of the courts referred to in section (a) upon the court's own motion or upon the motion of any party to the cause.

(c) Contents of certification order. A certification order shall set forth:

(1) the questions of law to be answered;

(2) a statement of all facts relevant to the questions certified and showing fully the nature of the controversy in which the questions arose;

(3) the names of the appellant and respondent;

(4) the names and addresses of counsel for the appellant and respondent; and

(5) any other matters that the certifying court deems relevant to a determination of the questions certified.

(d) Preparation of certification order the certification order shall be prepared by the certifying court, signed by the judge presiding at the hearing, and forwarded to the Supreme Court by the clerk of the certifying court under its official seal. The Supreme Court may require the original or copies of all or of any portion of the record before the certifying court to be filed with the certification order, if, in the opinion of the Supreme Court, the record or portion thereof may be necessary in answering the questions.

(e) Costs of certification. Fees and costs shall be the same as in civil appeals docketed before the Supreme Court and shall be equally divided between the parties unless otherwise ordered by the certifying court in its order of certification.

(f) Briefs and argument. Proceedings in the Supreme Court shall be those provided in the Nevada Rules of Appellate Procedure governing briefs and arguments.

(g) Opinion. The written opinion of the Supreme Court stating the law governing the questions certified shall be sent by the clerk under the seal of the Supreme Court to the certifying court and to the parties and shall be res judicata as to the parties. (Adopted 8-27-87, eff. 10-26-87.)

NV ST 11.200
N.R.S.11.200

NV ST 11.200
11.200. Computation of time
Current through 2002 18th Special Session of the 71st Legislature
N.R.S. 11.200

WEST'S NEVADA REVISED STATUTES ANNOTATED
TITLE 2. CIVIL PRACTICE
CHAPTER 11. LIMITATION OF ACTIONS
ACTIONS OTHER THAN FOR THE RECOVERY OF REAL PROPERTY
11.200. Computation of time

The time in NRS 11.190 shall be deemed to date from the last transaction or the last item charged or last credit given; and whenever any payment on principal or interest has been or shall be made upon an existing contract, whether it be a bill of exchange, promissory note or other evidence of indebtedness if such payment be made after the same shall have become due, the limitation shall commence from the time the last payment was made.

Formerly Civil Practice Act of 1911, § 26; RL (1912), § 4968; NCL (1929), § 8525.

<General Materials (GM) - References, Annotations, or Tables>

LIBRARY REFERENCES

Key Numbers

Limitation of Actions ⇐46 to 54.

Westlaw Key Number Searches: 241k46 to 241k54.

ALR Library

Medical malpractice: when limitations period begins to run on claim for optometrist's malpractice, 70 A.L.R. 4th 600.

Medical malpractice: statute of limitations in wrongful death action based on medical malpractice, 70 A.L.R. 4th 535.

Time of discovery as affecting running of statute of limitations in wrongful death action, 49 A.L.R. 4th 972.

When statute of limitations begins to run upon action against attorney for malpractice, 32 A.L.R. 4th 260.

What statute of limitations governs damage action against attorney for malpractice, 2 A.L.R. 4th 284.

Validity and construction, as to claim alleging design defects, of statute imposing time limitations upon action against architect or engineer for injury or death arising out of defective or unsafe condition of improvement to real property, 93 A.L.R. 3d 1242.

When statute of limitations begins to run against malpractice action in connection with sterilization or birth control procedures, 93 A.L.R. 3d 218.
When statute of limitations begins to run on negligent design claim against architect, 90 A.L.R. 3d 507.

Statute of limitations relating to medical malpractice actions as applicable to actions against unlicensed practitioner, 70 A.L.R. 3d 114.

When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body, 70 A.L.R. 3d 7.

Malpractice: failure of physician to notify patient of unfavorable diagnosis or test, 49 A.L.R. 3d 501.

Application of statute of limitations to damage actions against public accountants for negligence in performance of professional services, 26 A.L.R. 3d 1438.

Applicability, in action against nurse in her professional capacity, of statute of limitations applicable to malpractice, 8 A.L.R. 3d 1336.

Applicability, to negligence action against hospital, of statute of limitations applicable to malpractice and related actions against physicians, surgeons, or the like, 89 A.L.R. 2d 1180.

When statute of limitations commences to run against malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R. 2d 368.

Statute of limitations applicable to malpractice action against physician, surgeon, dentist, or similar practitioner, 80 A.L.R. 2d 320.

Encyclopedias

51 Am. Jur. 2d, Limitation of Actions § 1, 107.

C.J.S. Employer-Employee Relationship § 87.

C.J.S. Limitations of Actions §§ 131 to 140, 142 to 144, 146, 148, 150 to 158, 160 to 163, 206.

Practice References

4 Am. Jur. Trials 441, Solving Statute of Limitation Problems.

NOTES OF DECISIONS

Credit 3
Existing contract 5
Interest 4
Part payment 2
Payment, generally 1

1. Payment, generally

Affidavit signed by defendant's president did not toll six-year statute of limitations in regard to plaintiff's claim for recovery on promissory notes where affidavit did not directly, distinctly and unqualifiedly admit nor manifest any willingness or intent to pay the debt. N.R.S. 11.190, 11.390. Saye v. Paradise Memorial Gardens, Inc., 1976, 554 P.2d 274, 92 Nev. 526. Limitation Of Actions ⟨⟩155(1)

Payments made by corporation on valid note issued to director for services rendered were lawful, and effectively tolled the running of statute of limitations against cause of action on note. Rocky Mountain Powder Co. v. Hamlin, 1957, 310 P.2d 404, 73 Nev. 87. Limitation Of Actions ⇐155(1)

Action on note, commenced less than four years after last payment was made on principal of note, was not barred by limitations. Rocky Mountain Powder Co. v. Hamlin, 1957, 310 P.2d 404, 73 Nev. 87. Limitation Of Actions ⇐163(1)

Where no specific application of payments of an award of support had been made by either party, the court would make application of the payments to the oldest debt, in determining whether action was barred by statute of limitations. Biel v. Godwin, 1952, 245 P.2d 997, 69 Nev. 189. Limitation Of Actions ⇐157(4)

A payment on an invalid mortgage, given by a guardian of a minor, held to be applied on a former mortgage, satisfied from the proceeds of such invalid mortgage, so as to toll limitations against the right of the second mortgagee to enforce the former mortgage by way of subrogation. Laffranchini v. Clark, 1915, 153 P. 250, 39 Nev. 48. Limitation Of Actions ⇐157(4)

Gen. St. §§ 3644, 3645, provide that "actions can only be commenced with six years on a contract, obligation, or liability founded upon an instrument in writing," and that the time "shall be deemed to date from the last transaction, or the last item charged or the last credit given." Held, in an action to redeem from a mortgage of real property, that the payment of taxes on the land by

the mortgagor or mortgagee, after the mortgage debt was due, did not prevent the running of the statute of limitations in favor of the mortgagee in possession, and such action was barred when not brought within six years from the maturity of such debt. Borden v. Clow, 1892, 30 P. 821, 21 Nev. 275, 37 Am.St.Rep. 511. Limitation Of Actions ⇨157(1)

Under St. 1861, p. 31, § 60, making no acknowledgment sufficient evidence of a new or continuing contract, to raise the statutory bar, "unless the same be contained in some writing signed by the party to be charged thereby," the payment must be to some one authorized to receive it; and a remittance to a third party with directions to have it applied on the note is insufficient. Taylor v. Hendrie, 1873, 8 Nev. 243. Limitation Of Actions ⇨154

2. Part payment

Where cause of action for money lent to defendants and for value of jewelry purchased by defendants from plaintiffs had become barred by statute of limitations, and thereafter defendants made a part payment, not accompanied by a written promise to pay the remainder, the statute of limitations was not tolled, and the cause of action was barred. N.R.S. 11.190, 11.200, 11.390. Riff v. Kowal, 1960, 352 P.2d 819, 76 Nev. 271. Limitation Of Actions ⇨157(1)

Part payment is not sufficient as a new promise to take a case out of the operation of the statute of limitations, which excludes an acknowledgment or promise not in writing as evidence of a new or continuing contract.

Wilcox v. Williams, 1869, 5 Nev. 206. Limitation Of Actions ⟜163(4)

3. Credit

Plaintiff's affidavit that he gratuitously and unilaterally gave defendants $50 credit, in September, 1965, to be applied on defendants' obligation of 1959- 1960 did not establish proof required to show that voluntary payment was made at time which would toll statute of limitation as to action on debt, and, hence, grant of summary judgment was proper. N.R.S. 11.390. Havas v. Long, 1969, 454 P.2d 30, 85 Nev. 260. Judgment ⟜ 185.3(2)

4. Interest

The payment of interest on a debt will ordinarily take the debt out of the operation of the statute of limitations where the payment is made by the debtor, but if the payment is made by a third party, it must be authorized by the debtor and be made under his direction. Mobile Discount Corp. v. Price, 1983, 656 P.2d 851, 99 Nev. 19. Limitation Of Actions ⟜155(1); Limitation Of Actions ⟜157(3)

Once debtors failed in 1971 to make any further payments of a retail installment contract, a default occurred, so that a cause of action in the creditor's assignee accrued, and suit filed in 1980 was untimely, notwithstanding alleged tolling of statute of limitations by payment of interest on debt, where payment was made by a third party and was neither authorized by the debtors nor made under their direction. N.R.S. 104.2725. Mobile Discount Corp. v. Price, 1983, 656 P.2d 851, 99 Nev. 19. Limitation Of Actions ⟜155(1)

Four-year limitation on action to recover interest paid under usurious contract commences to run from date last or most recent interest payment was made. N.R.S. 11.190, subd. 2(c), 11.200. Miller v. York, 1976, 548 P.2d 941, 92 Nev. 226. Limitation Of Actions ⇐163(6)

Where action to recover usurious interest payments was brought within four years of date of last interest payment, action was not barred by limitations. N.R.S. 11.190, subd. 2(c), 11.200. Miller v. York, 1976, 548 P.2d 941, 92 Nev. 226. Limitation Of Actions ⇐163(6)

5. Existing contract

Under statute providing that whenever any payment on principal or interest has been made upon an "existing contract", the limitation shall commence from the time the last payment was made, the phrase "existing contract" refers to an existing enforceable contract, and part payment of an amount due does not extend the period of time within which suit may be brought where the enforcement of the contract has already been barred by the statute of limitations at the time of the payment. N.R.S. 11.200. Riff v. Kowal, 1960, 352 P.2d 819, 76 Nev. 271. Limitation Of Actions ⇐163(5)

N. R. S. 11.200, NV ST 11.200

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